No. 01-341

In the Supreme Court of the United States

JOSEPH OSLER BRICE, ET AL., PETITIONERS

v.

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
MARK ROGERS
MICHAEL E. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the 36-month filing deadline for filing petitions under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-16(a)(2), is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 240 F.3d 1367. The initial decision of the special master is unreported. The first decision of the Court of Federal Claims (Pet. App. 24a-39a) is reported at 36 Fed. Cl. 474. The second decision of the special master is reported at 1996 WL 718287. The second decision of the Court of Federal Claims is unreported. The special master's third decision is reported at 1998 WL 136562. The third decision of the Court of Federal Claims is reported at 44 Fed. Cl. 673.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2001. A petition for rehearing was denied

on May 31, 2001. Pet. App. 40a-41a. The petition for a writ of certiorari was filed on August 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act), Pub. L. No. 99-660, Tit. III, 100 Stat. 3755, 42 U.S.C. 300aa *et seq.*, establishes a compensation program under which a person injured by a vaccine may file a petition to obtain compensation from a federal fund financed by a tax on vaccines. 42 U.S.C. 300aa-11(a)(2)(A). A private civil action may not be filed against a vaccine manufacturer or administrator for injuries in excess of $1000 before pursuing a claim under the Act. 42 U.S.C. 300aa-11(a)(2)(A).

Petitions must be filed in the Court of Federal Claims within 36 months after "the date of the occurrence of the first symptom or manifestation of onset" of the alleged vaccine-related injury. 42 U.S.C. 300aa-16(a)(2).* The Act creates an exception to that limitations period when a person mistakenly files a civil action for a vaccine injury in a state or federal court rather than in the Court of Federal Claims. Such an action must be dismissed, but "the date such dismissed action was filed shall * * * be considered the date the petition was filed" in the Court of Federal Claims provided that "the petition was filed within one year of the date of the dismissal of the civil action." 42 U.S.C. 300aa-11(a)(2)(B). Upon completion of proceedings under the Act, the petitioner may reject the award and litigate

* An Office of Special Masters acts as an adjunct to the Court of Federal Claims and adjudicates claims filed pursuant to the Act. 42 U.S.C. 300aa-12(c).

the claim under state tort law, subject to certain limitations. 42 U.S.C. 300aa-11(a), 300aa-21. Applicable state statutes of limitations are tolled during processing of petitions under the Act. 42 U.S.C. 300aa-16(c).

Joseph Tilghman and his parents (petitioners) filed a petition seeking compensation under the Vaccine Act. Pet. App. 4a. Joseph allegedly received a vaccination on April 30, 1992, and allegedly suffered a seizure nine days later. *Ibid.* Thus, absent tolling, the 36-month limitations period ended on May 9, 1995. *Ibid.* Petitioners did not file their petition, however, until December 19, 1995, more than seven months later. *Ibid.*

The special master dismissed the petition based on the lack of a timely filing. Pet. App. 5a. The Court of Federal Claims held that the Act's limitations period is subject to equitable tolling, and remanded for a determination of whether equitable tolling was appropriate under the circumstances of this case. *Ibid.*

On remand, the special master determined that petitioners had failed to exercise reasonable diligence and that equitable tolling was therefore not appropriate. Pet. App. 6a. The special master explained that petitioners knew that Joseph was suffering a vaccine reaction almost immediately after the vaccination, and that five weeks before the limitations period expired, a treating neurologist advised petitioners to pursue a claim under the Vaccine Act. *Brice* v. *Secretary of the Dep't of HHS*, No. 95-835V, 1996 WL 718287, at *4 (Fed. Cl. Spec. Mstr. Nov. 26, 1996). The Court of Federal Claims again remanded to the special master, this time for a determination whether petitioners exercised due diligence after they learned on March 30, 1995, that Joseph suffered from residual seizure disorder. Pet. App. 6a. The special master concluded that petitioners exercised "no diligence in this case, much

less due diligence." *Brice* v. *Secretary of the Dep't of HHS*, No. 95-835V, 1998 WL 136562, at *2 (Fed. Cl. Spec. Mstr. Mar. 12, 1998). The Court of Federal Claims affirmed the special master's decision. Pet. App. 6a.

The Federal Circuit affirmed, but on a different ground. Pet. App. 1a-23a. Applying the standard set forth in *United States* v. *Brockamp*, 519 U.S. 347 (1997), the court of appeals held that the Vaccine Act's filing deadline is not subject to equitable tolling. Pet. App. 11a-12a.

In reaching that conclusion, the court relied on the Act's express exception to the limitations period for claims that are erroneously filed in a state or federal court. Pet. App. 11a-12a. The court observed that "[w]hen an Act includes specific exceptions to a limitations period, we are not inclined to create other exceptions not specified by Congress." *Id.* at 12a. The court of appeals also deemed it significant that the Act includes other strict deadlines demonstrating that Congress intended for claims to be resolved expeditiously. The court explained that equitable tolling "invites prolonged and wasteful collateral litigation" and is therefore "directly inconsistent with Congress's objective in the Vaccine Act to settle claims quickly and easily." *Ibid.* The court also noted that the Act's limitations period runs from the date of the first symptom or manifestation of the onset of the injury, regardless of whether a petitioner is aware that the vaccine has caused the injury. *Id.* at 13a. The court concluded that "[i]t would be quite odd for Congress to allow a limitations period to run in cases in which a petitioner has no reason to know that a vaccine recipient has suffered an injury, but to provide for equitable tolling when a petitioner is aware that a vaccine has caused an injury but has delayed in filing suit." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 9-17) that the Vaccine Act is subject to equitable tolling. That contention is without merit and does not warrant review.

In *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997), the Court held that, in general, a statute is subject to equitable tolling unless there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply[.]" As the court of appeals concluded, under the Vaccine Act, there are three good reasons to believe that Congress did not want equitable tolling to apply. First, the Act includes a specific exception from the limitations period for a petition mistakenly filed in state or federal court. Pet. App. 11a-12a. Second, the Act includes other strict deadlines, reflecting an intent for claims to be resolved expeditiously. *Id.* at 12a. And third, the limitations period runs from the date of the first manifestation of an injury, regardless of whether a petitioner is aware that the vaccine has caused the injury. *Id.* at 13a.

Petitioners contend (Pet. 13-14) that the Act's exception for claims that have been mistakenly filed in state or federal court "does not support the conclusion that Congress intended to negate" tolling under all other circumstances. That contention is undermined by this Court's decision in *Brockamp*. In that case, the Court held that the two-year limitations period governing a particular provision of the Internal Revenue Code is not subject to equitable tolling. The Court deemed it especially significant that the Code provision "set[] forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling.'" 519 U.S. at 351. The Court explained that "the explicit listing of exceptions, taken together, indi-

cates to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Id.* at 352.

Significantly, the Vaccine Act's tolling provision makes clear that it is an exception to the limitations period. 42 U.S.C. 300aa-11(a)(2)(B) ("for purposes of the limitations of actions prescribed by section 300aa-16 of this title"). That internal reference reinforces the conclusion that Section 11(a)(2)(B) was intended by Congress to be the only exception to the statutory deadline. That is particularly true because the Vaccine Act's tolling provision mirrors one, but only one, of the traditional bases for granting equitable tolling. *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965) (equitable tolling appropriate when complaint is timely filed in the wrong court).

Petitioners also argue (Pet. 14-16) that the existence of a detailed statutory scheme that includes other strict deadlines does not support the conclusion that Congress did not intend to allow equitable tolling. But as the court of appeals explained, equitable tolling invites substantial collateral litigation, and such litigation can significantly delay the resolution of claims. Petitioners may prefer such delay to no recovery at all. Pet. App. 12a. But such delay works to the detriment of everyone else, including other claimants. This case illustrates the problem: it has generated more than five years of litigation on the question whether petitioners acted with reasonable diligence in filing their claim to begin with. *Ibid.*

Petitioners ignore entirely the court of appeals' third reason for concluding that Congress did not intend for the Vaccine Act's limitations period to be subject to equitable tolling—that the Act's limitations period runs from the date of the first symptom or manifestation of

the onset of the injury, regardless of whether a petitioner is aware that the vaccine has caused the injury. Pet. App. 13a. As the court explained, "[i]t would be quite odd for Congress to allow a limitations period to run in cases in which a petitioner has no reason to know that a vaccine recipient has suffered an injury, but to provide for equitable tolling when a petitioner is aware that a vaccine has caused an injury but has delayed in filing suit." *Ibid.* Moreover, the only ground petitioners advance for tolling the limitations period, if tolling is allowed at all, is their assertion (Pet. 3, 10) that they did not know of Joseph's vaccine-related injury until March 1995. That asserted justification, which was rejected by the special master and Court of Federal Claims as a factual matter (see pp. 3-4., *supra*), is fundamentally inconsistent as a legal matter with the rule that the limitations period begins to run from the date of the injury *irrespective* of when the petitioner learned of it.

Petitioner's reliance on the Act's "'benevolent' statutory scheme" (Pet. 17) is misplaced. That factor does not justify ignoring the three other considerations that show that Congress intended to limit its benevolence to those who file claims within the statutory period, subject to a single exception for those who file claims in the wrong court.

In fact, the special nature of the Vaccine Act program cuts against the availability of equitable tolling. The Act establishes an alternative to traditional tort litigation, affording a means of recovery that is more expeditious and subject to relaxed standards of proof. But while proceedings under the Vaccine Act are pending, the time for filing a tort action under *state* law is tolled, 42 U.S.C. 300aa-16(c), thereby delaying the resolution of any state-law claims and extending the

period of uncertainty for potential defendants in private litigation. That statutory structure furnishes special reasons to conclude that Congress did not also intend for the *federal* limitations period to be tolled—with the consequence of still further delay in resolving state-law claims—except in the narrow situation (filing in the wrong court) that it expressly so provided.

2. Petitioners contend (Pet. 6) that this Court's decisions on equitable tolling have "creat[ed] confusion and uncertainty." But the cases cited by petitioners (Pet. 6-9) reflect nothing more than the inevitable consequence of applying a general standard to different statutory frameworks. *Brockamp* makes clear that the relevant inquiry is whether there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply[,]" 519 U.S. at 350, and the factors that are relevant in answering that question may vary with the statutory schemes at issue. Petitioners have not identified any conflict in the circuits concerning any statute with all the features of the Vaccine Act, and petitioners' general concern that courts of appeals need further guidance on how to apply *Brockamp* does not warrant this Court's review. In any event, because this case reflects such a straightforward application of *Brockamp*, it is not an appropriate vehicle for addressing any general confusion in the circuits on how to apply the *Brockamp* inquiry.

3. Review is also unwarranted in this case because petitioners could not benefit from a rule allowing equitable tolling. Litigants who fail "to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 151 (1984). The special master in this case found that petitioners knew about their child's alleged vaccine-injury shortly after it occurred, and were speci-

fically advised to file a claim well before the relevant filing deadline expired. Petitioners, however, waited until more than seven months after the deadline to file their claim. As the special master concluded, petitioners exercised "no diligence in this case, much less due diligence." *Brice* v. *Secretary of the Dep't of HHS*, No. 95-835V, 1998 WL 136562, at *2 (Fed. Cl. Spec. Mstr. Mar. 12, 1998). That finding was affirmed by the Court of Federal Claims. Pet. App. 6a. Given that finding, petitioners could not benefit from a holding that the Vaccine Act's limitations period is subject to equitable tolling.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
MARK ROGERS
MICHAEL E. ROBINSON
Attorneys

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